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No. 88-533

In The
Supreme Court of the United States
October Term, 1988

—o—

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,

Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

RESPONDENT EKLUTNA, INC.'S BRIEF IN OPPOSITION

—o—

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QUESTIONS PRESENTED

1. Whether petitioner's suit against the United States claiming title to land under the homestead laws is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g), because petitioner knew or should have known of the United States' claim to the land when his homestead claim was denied by the Secretary of Interior in the late 1950's and when the Bureau of Land Management published its Notice of Filing Plat of Survey describing withdrawn areas in 1961?

2. Whether the United States is an indispensable party to petitioner's suit against the respondent Alaska Native Village Corporation that holds the disputed land under patent to the surface estate issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, because, under ANCSA, a judgment in petitioner's favor would enable the Village Corporation to obtain additional land from the United States?

3. Whether ANCSA § 14(c)(1), 43 U.S.C. 1613(c)(1), should be construed against a trespasser on Federal land to deny him amnesty and the right to take land from an Alaska Native Village Corporation, the intended beneficiary of ANCSA and holder of the patent to the land?

4. Whether the United States is an indispensable party to a suit by a failed homesteader under ANCSA § 14(c)(1) against an Alaska Native Village Corporation?

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STATEMENT OF THE CASE

This case concerns the ownership of 92.5 acres of land in the Eagle River Valley near Anchorage, Alaska. Long before any white settlement, the Eagle River Valley was encumbered by aboriginal title and by traditional subsistence use and occupation of the valley by Alaska Natives.[1] These traditional claims of aboriginal title by the Natives were formally presented for adjudication before the Indian Claims Commission in 1953.[2] Pet. App. E[3] at 84a. These claims were extinguished by the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 *et seq.* 43 U.S.C. 1603(b). Pursuant to ANCSA, Eklutna, Inc.[4] ("Eklutna") was formed as the Village Corporation which includes as shareholders the Natives of the disputed area. 43 U.S.C. 1607(a), 1610(b). Eklutna selected and received patent to the surface estate to lands, including those currently in dispute, as settlement of their aboriginal claims. 43 U.S.C. 1611(a)(1), 1613(a).

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[1]The term "Natives" in Alaska includes Indians, Aleuts, and Eskimos.

[2]Even earlier, all the lands in the Eagle River Valley which are relevant to this case had been part of the Eklutna Reserve established under the Indian Reorganization Act. Pet. App. E at 84a.

[3]"Pet. App." refers to petitioner's Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. "Pet. App. E" refers to the Findings of Fact, *United States v. Donnelly*, A75-27 Civil, United States District Court for the District of Alaska, February 5, 1981, pp. 58a-86a of petitioner's Appendix.

[4]Pursuant to Supreme Court Rule 28.1, Eklutna, Inc. has no parent company or subsidiary, except wholly owned subsidiaries.

In 1925, Power Site Classification ("PSC") 107 withdrew the disputed land from appropriation under the public land laws for power site purposes under § 24 of the Federal Power Act, 16 U.S.C. 818. In 1950, PSC 399 also withdrew the land. Pet. App. E at 60a. Although in 1952 the Federal Power Commission ("FPC") determined that the value of the disputed land would not be injured or destroyed for the purposes of power development by location or entry, Pet. App. M at 107a, the Secretary of Interior never acted pursuant to § 24 of the Federal Power Act to revoke the withdrawal, and the land therefore remained closed to entry. Pet. App. C at 35a.

In 1957, petitioner Joseph Donnelly ("petitioner" or "Donnelly") filed a Notice of Location of Settlement of Occupancy Claim in Alaska, embracing, *inter alia*, the land now in dispute. Pet. App. E at 59a; Gov. Summary Judgment Ex.[5] 1A (4/22/57 Notice). On November 14, 1957, the Bureau of Land Management ("BLM") issued its first decision denying the Donnelly Claim. Pet. App. E at 65a; Tr. Ex. EK[6]-D. The denial of Donnelly's entry was based upon the power site conflict, and it informed Donnelly that even if the land were restored to entry, the filing of the location notice would confer no preferential rights upon him. Tr. Ex. EK-D. Although the adverse decision advised Donnelly of his right to appeal, *id.*, he failed to. Instead, he filed a second Notice of Location on the same land on May 2, 1958. Pet. App. E at 65a; Tr. Ex. EK-D.

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[5]"Gov. Summary Judgment Ex." refers to the federal government's exhibits on summary judgment.

[6]"Tr. Ex. EK" refers to Eklutna's Trial Exhibits

Donnelly then asked the FPC to restore the lands to entry under the homestead laws. Pet. App. E at 66a. In a November 1958 response, the FPC informed him of the 1952 no injury determination but stated that actual restoration was a function of the BLM. *Id.* Donnelly then unsuccessfully sought the help of Alaska's Senator Bartlett to obtain his 160 acres. Pet. App. E at 66a-67a. The BLM informed the senator that Donnelly was in trespass on a federal power reserve. Moreover, the FPC told the senator that revocation of the power site reserve would not necessarily result in Donnelly securing rights to the land because the State of Alaska and veterans would have preference under the homestead laws. Pet. App. E at 66a-69a.

On February 8, 1959, petitioner and several other homestead claimants in Eagle River sent a letter to the Secretary of Interior, asking for "clarification" of the status of their entries. Pet. App. E at 69a; ER-D[7] 212-13. The letter was not identified as an appeal of adverse agency decisions. The Assistant Secretary responded on March 12, 1959, expressly stating that "any settlement of the reserved lands cannot be recognized under existing law" and that there was no intent to revoke the powersite reserve. ER-D 214-15; Pet. App. E at 69a-70a.

Shortly before the Assistant Secretary's March 12 letter, Donnelly submitted his final proof on March 2, 1959. Pet. App. E at 70a; Gov. Summary Judgment Ex. 1B. He was notified on March 5, 1959 that his claim was denied and that he was in trespass. Pet. App. E at 70a-71a, Tr. Ex. EK-O:

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[7]"ER-D" refers to Donnelly's Excerpt of Record in the appeal to the Ninth Circuit.

> The records show that the lands in question are not subject to settlement or occupancy because they have not been restored from [PSC] 399. . . . While it is true that the [FPC] made a favorable determination November 4, 1952, . . . none of the unsurveyed lands have been restored to entry by the [BLM], and in all probability no action will be taken to restore them until they have been surveyed. . . .
>
> You previously filed a homestead location notice . . . for the same lands and were advised that they were not subject to settlement or occupancy.
>
> In view of the foregoing, any use or occupancy of these lands will constitute a trespass against the United States.

In March 1961, a Notice of Filing Plat of Survey was officially promulgated and published in the Federal Register delineating the boundaries of PSCs 107 and 399. 26 Fed. Reg. 2486 (1961). All but forty acres of Donnelly's claimed 160 acres remained within PSCs 107 and 399 and therefore remained closed to entry. Pet. App. E at 72a. Accordingly, petitioner was served with a final decision rejecting his entry to the extent it conflicted with the surveyed withdrawals and reinstating his claim as to available lands. Tr. Ex. EK-W (5/12/61 Decision). Indicating that it wished to reach an equitable settlement, however, the BLM vacated its decision as to lands *outside* the withdrawal area on May 15, 1961, "pending further investigations which may result in a more equitable conformance of the withdrawals or delineation of the actual withdrawal line as originally described". The decision warned that it "is not to be construed as granting any rights or concessions to the withdrawn lands. . . ." Pet. App. E at 72a-73a. In 1962, BLM refined its survey and determined that 67.5 acres of Donnelly's claim was out-

side of the reserves and that 92.5 acres were within the withdrawn area. Pet. App. E at 74a. Thus, at no time did the United States claim less than 92.5 acres of Donnelly's entry.

On February 21, 1963, the report of field examination of Donnelly's claim was filed. In addition to noting partial conflict with the power withdrawals, the report noted that Donnelly had not complied with the improvement or cultivation requirements. Final certificate and patent were not recommended. Pet. App. E at 75a; Tr. Ex. EK-BC. The report also concluded that little, if any, of the area within the withdrawals was truly suitable for agriculture. *Id.*

The BLM was willing to consider granting patent for the portion of Donnelly's entry located outside the withdrawal area but was faced with the problem that Donnelly's original dwelling and cultivation were located within the withdrawn portion. Donnelly notified the BLM in June, 1963 that he had retained legal counsel, who met with the BLM to discuss a "workable solution." Pet. App. E at 76a; Tr. Ex. EK-BF. In September 1963, the lawyer wrote to BLM that "the possibilities of compromise appear likely," and requested that the BLM "not issue decisions with regard" to Donnelly's entry. Tr. Ex. EK-BK.

The BLM agreed to a solution whereby Donnelly's improvements on the 92.5 acres in the withdrawn area would be considered "constructive" residence and cultivation, with additional time allowed to comply upon available land, even though the five year life of Donnelly's claim had expired. Pet. App. E at 79a-80a; Tr. Ex. EK-BR (6/11/64 letter). Donnelly chose to settle his claim for the 67.5

available acres and represented to BLM that he would not pursue the entire 160 acres of his original claim. Tr. Ex. BQ (10/18/63 memo). In accordance with the BLM's requirements, he agreed to place his house and cultivation on the 67.5 acre portion outside the reserve, filed a new homestead application, and submitted affidavits asserting compliance. *Id.*; Tr. Ex. SSS, TTT, and UUU.

On June 25, 1965, patent was issued to Donnelly for 67.5 acres outside the withdrawn area. Tr. Ex. EK-BT; Pet. App. E at 80a-81a. Although represented by counsel, Donnelly failed to appeal the BLM's decision not to grant him the withdrawn 92.5 acres. Instead, he filed a Petition for Revocation of Power Sites affecting the 92.5 acres. Tr. Ex. EK-CF. His Petition was denied on May 13, 1968. Pet. App. E at 81a; Tr. Ex. EK-CF. Donnelly appealed this decision but the decision was affirmed. Pet. App. E at 81a-83a; Tr. Ex. EK-CH. Donnelly took no further administrative action. Pet. App. 83a.

On December 22, 1970, Donnelly was served with a Notice of Trespass, alleging that he had unlawfully entered upon withdrawn Federal land. *Id.*; Tr. Ex. EK-CJ. Donnelly not only failed to move, he actually proceeded with construction on the disputed land. Pet. App. C at 39a.

Upon the adoption of ANCSA on December 18, 1971, the disputed lands were again withdrawn to allow for selection and conveyance to Native Corporations. 43 U.S.C. 1610(a). The disputed lands were among those listed on Eklutna's selection application filed on July 17, 1974 pursuant to 43 U.S.C. 1611(a)(1). In 1979, the United States issued patents to Eklutna for the surface estate of these lands.

On February 10, 1975, the United States filed a trespass action against Donnelly in the United States District Court for the District of Alaska. CR-D[8] 1 (Complaint). On May 23, 1975, at least fourteen years after being informed of the claim of the United States, ER-D 128, Donnelly filed a counterclaim in district court. CR-5. After the United States issued its patent to Eklutna in 1979, the district court dismissed the government's trespass action, and Eklutna came into the action in order to protect its ownership interest in the disputed lands. Pet. App. D at 41a.

Donnelly subsequently filed a series of claims against Eklutna, attacking the validity of the federal patent to the disputed land and claiming that his homestead rights to title were preserved as against Eklutna through ANCSA § 14(g) (43 U.S.C. 1613(g)) as a "valid existing right,"[9] and through 22(b) (43 U.S.C. 1621(b)) as a homestead

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[8]"CR-D" refers to the Donnelly Court Record.

[9]ANCSA § 14(g) provides in pertinent part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

claim,[10] as well as through the application of several common-law theories. In addition, Donnelly claimed title to the disputed land as a primary place of residence under ANCSA § 14(c)(1) (43 U.S.C. 1613(c)(1)),[11] a claim which did not attack the validity of the federal patent but which demanded that Eklutna reconvey the disputed land. Pet. App. C at 41a. In 1982, the district court dismissed Donnelly's counter-claims against the United States and his claims against Eklutna based on the validity of the United States patent for lack of jurisdiction.[12] Pet. App. B.

In 1979, another claimant to a homestead in the Eagle River Valley, James Lee, filed suit against the United States and Eklutna, alleging essentially the same claims as petitioner and represented by the same counsel. Pet. App. C. at 42a. The district court dismissed all of Lee's

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[10]ANCSA § 22(b) provides in pertinent part:

> The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites . . . , and who have fulfilled all requirements of the law prerequisite to obtaining a patent.

[11]ANCSA § 14(c) provides in pertinent part that, upon receipt of a patent or patents,

> (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 . . . as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry; . . .

[12]Donnelly's § 14(c)(1) claim was not addressed, nor was his third cause of action against Eklutna, which alleged violations of equal protection and due process. Pet. App. D at 51a, n. 1.

claims, except for his § 14(c)(1) claim, for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985). Lee's claims against the federal government and against Eklutna under §§14(g) and 22(b) and common law theories were consolidated with two similar cases for appeal to the Ninth Circuit, which affirmed the judgment of the district court. *Lee v. United States,* 809 F.2d 1406 (9th Cir. 1987). Recently, this Court denied certiorari, *sub nom Lee v. Eklutna, Inc.,* — U.S. —, 108 S.Ct. 772 (1988).

During this period, Lee's § 14(c)(1) claim was consolidated with Donnelly's case by the district court for the purpose of oral argument on the § 14(c)(1) issue. CR-D 284. On November 14, 1986, the district court filed an order dismissing Donnelly's and Lee's § 14(c)(1) claims, granting summary judgment to Eklutna, on the grounds, *inter alia,* that the disputed lands were at all times validly withdrawn, that Donnelly and Lee therefore never made valid entry, and that an illegal occupant cannot gain rights under § 14(c)(1). Pet. App. C.

On December 5, 1986, the district court amended its 1982 decision dismissing Donnelly's homestead claim against the United States and against Eklutna based on the validity of the patent, adopting its analysis in *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), on those issues. Pet. App. D. Judgment was issued, which included Rule 54(b) certifications on those issues.[13] ER-D

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[13]The district court also dismissed Donnelly's constitutional claims. Pet. App. D at 54a-56a. Eklutna's ejectment action against Donnelly is still pending.

46-49. The Ninth Circuit affirmed. *Donnelly v. United States*, 841 F.2d 968 (9th Cir. 1988).[14] Donnelly then filed this petition. Lee has also filed a petition for certiorari, No. 88-549, as to his § 14(c)(1) claim.

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REASONS WHY THE PETITION SHOULD BE DENIED

Donnelly's non-§ 14(c)(1) claims were the same as those litigated and lost by the claimant in *Lee v. United States, supra.* This Court recently denied certiorari, 108 S.Ct. 772 (1988), and no reason exists why certiorari should now be granted on the same claims.

As to Donnelly's § 14(c)(1) claim, the court of appeals was correct in holding that the language and intent of that law do not require that trespassers be awarded land at the expense of Native Corporations, the intended beneficiaries of ANCSA, and that the United States is an indispensable party to a § 14(c)(1) claim based on a homesteading claim. This holding does not conflict with the recent decision of the Alaska Supreme Court in *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988).

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[14]The reported decision, which was issued on March 10, 1988, is not the Amended Opinion of the Court of Appeals, issued on June 27, 1988. The Amended Opinion is set forth at Pet. App. A. The Amended Opinion differs from the reported decision in that having a reference to a case decided by the Alaska Supreme Court issued just after the reported decision (and apparently without the knowledge of the reported decision), *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988). See Pet. App. A at 16a, n.9. See, this Opposition, *infra*, at pp. 22 to 23.

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. The decision does not present a question of general importance that should be reviewed by this Court.

I. PETITIONER'S CLAIMS AGAINST THE UNITED STATES WERE PROPERLY DISMISSED.

Donnelly's homestead claims against the United States are the same as Lee's and involve almost identical facts. The Ninth Circuit, having held in *Lee,* 809 F.2d 1406 (9th Cir. 1987), that virtually identical claims were barred by the statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g), did the same in this case. *Donnelly v. United States,* 841 F.2d 968 (9th Cir. 1988). This court denied certiorari in *Lee* earlier this year, — U.S. —, 108 S.Ct. 772 (1988), and should do the same in this case.

Donnelly argues that his counterclaims against the United States, filed on May 23, 1975, were within the twelve year statute of limitations under 28 U.S.C. 2409a(g). Petition at 23-24. However, the district court found that his claim to the disputed lands accrued at least by 1958, when the BLM rejected his homestead entry, or by 1961 at the latest, when the BLM issued its survey covering the contested land and published notice of the survey in the Federal Register. Pet. App. D at 52a. The court of appeals agreed with the district court, holding that Donnelly had sufficient notice of the government's adverse claim by the time of the publication in the Federal Register to start the statute of limitations. 841 F.2d at 974. The court of appeals further found that Donnelly

by 1961 was not engaged in pursuit of administrative remedies that would toll the statute of limitations and that he "sat on his rights" and brought no quiet title claim from October 1972, when the Quiet Title Act was enacted, until May 1975. The statute of limitations expired during this period. 841 F.2d at 974 and n.8.

The twelve-year statute of limitations began to run when Donnelly "knew or should have known of the claim of the United States" to the disputed lands. 28 U.S.C. 2409a(g); *Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987). Throughout the entire period that Donnelly dealt with the government, he was constantly being advised that the lands were withdrawn and that he was in trespass. *Supra* at pp. 12-17. As the *Lee* court of appeals court stated, 809 F.2d at 1410:

> A claim accrues as soon as a potential claimant either is aware or should be aware of the existence of and source of his injury, not when he knows or should know that the injury constitutes a legal wrong. A different rule would require insufficient diligence on the part of potential claimants. *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979).

The factual background that leads to Donnelly's request for "a different rule" aptly illustrates dangers of "insufficient diligence" on the part of claimants and the potential prejudice to the United States and to innocent third-parties, such as Eklutna.

In addition, the issue Donnelly raises can only be resolved through factual determinations that were previously decided adversely to Donnelly by two lower courts. In this case, such questions of fact do not constitute an appropriate subject for a grant of certiorari.

II. PETITIONER'S §§ 14(g) AND 22(b) CLAIMS AGAINST EKLUTNA WERE PROPERLY DISMISSED ON THE BASIS OF THE LEE PRECEDENT.

As Lee before him, Donnelly tries to assert his barred federal homestead claims against Eklutna by contending that they constitute a "valid existing right" under § 14(g) or were renewed by § 22(b) and can therefore be litigated against Eklutna. In essence, Donnelly is seeking a way into the courthouse through the backdoor. He is incongruously arguing that ANCSA, which was enacted to settle the aboriginal claims of Alaska Natives, should be construed to settle beneficially the stale claims of failed homesteaders, effectively giving those failed homesteaders rights against the Natives that they would not have had against the government.

However, the claim that a failed homesteader can litigate homestead claims under the guise of §§ 14(g) or 22(b) was rejected when advanced by Lee, who was similarly-situated and even represented by the same lawyer. *Lee v. United States*, 629 F.Supp. 721, 725 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied* — U.S. —, 108 S.Ct. 772 (1988). In *Lee*, the Ninth Circuit did not reach the merits of the claimant's arguments on §§ 14(g) and 22(b).[15] Instead, it held that the United States was an indispensible party to the action whose

[15]The *Lee* district court held that Lee failed to state a claim under § 14(g) because that statute protected rights that did not lead to title (e.g., leases, rights-of-way, easements, etc.). 629 F.Supp. at 729-730. The district court further held that a § 22(b) claim was a homestead claim that had to be made against the government, not a Native Corporation which was not under the duty to convey lands to homesteaders. 629 F.Supp. at 732.

absence required dismissal of the claims against the Native Corporation. 809 F.2d at 1411.

In this case, the court of appeals correctly relied upon *Lee* in dismissing petitioner's claims against Eklutna under ANCSA §§ 14(g) and 22(b) on the grounds that the United States is an indispensable party to a claim based on a homestead contesting the validity of a federal patent to a Native Corporation. The question whether a suit should be dismissed because of the absence of an indispensable party is governed by Fed. R. Civ. P. 19. The United States is a party that should be joined under Fed. R. Civ. P. 19(a) because if Donnelly prevails on his § 22(b) claim and Eklutna is required to convey the disputed land to Donnelly, the United States will have to make up the acreage to Eklutna. 43 U.S.C. 1621(j)(2). Similarly, if Donnelly prevails on his § 14(g) claim, which is nothing more than a § 22(b) homestead claim under another guise, and Eklutna is required to convey the disputed land to Donnelly, then Eklutna will claim additional land from the United States under 43 U.S.C. 1621(j)(2).[16] Thus, whether

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[16]Under § 22(b), homestead claims are to be decided by the Secretary *before* land is patented to a Village Corporation. Thus, a Village Corporation receives its full land entitlement notwithstanding any homesteads in the area. On the other hand, a Village Corporation takes its patent *subject to* the non-title § 14(g) rights, which arguably implies that a Village Corporation whose lands are subject to such rights actually receives less than a Village Corporation whose lands are free from such rights. However, if Eklutna is required to convey the disputed homestead land to Donnelly under § 14(g) because his was a homestead claim that the government did not decide prior to patent to Eklutna, then Eklutna will claim additional land from the United States on the same basis as it would if Donnelly prevails under § 22(b).

the United States will be deprived of additional land depends on whether Donnelly prevails in his suit against Eklutna. *See Nichols v. Rysavy*, 809 F.2d 1317 at 1333 (8th Cir.), *cert. denied* 108 S.Ct. 147 (1987):

> [T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then the appellants' action is groundless. "In short, the government's liability cannot be tried 'behind its back.'" *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945)

Federal Rule of Civil Procedure 19(b) requires that, in the event an interested person under Rule 19(a) cannot be made a party, the court must determine whether "equity and good conscience" allows the action to proceed. In this case, an analysis of the four-part test described in Rule 19(b) shows that the court of appeals correctly dismissed Donnelly's claims because of the absence of the United States. The first part of the test is whether a judgment will prejudice the absent party. Here, the prejudice in the nature of the United States' obligation to convey additional lands to Eklutna is clear. The second part of the test is whether relief may be shaped to lessen the harm to the absent party. Again, the United States' obligation to convey additional land is absolute and cannot be modified.

The third and fourth parts of the test are whether a judgment rendered in the absence of the United States would be adequate and whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder. These factors may indicate to some extent that

Donnelly's suit against Eklutna should proceed. But the analysis of the fourth factor shows that equitable factors weigh against allowing such a suit to proceed. In failing to timely file an action under the Quiet Title Action ("QTA"), 28 U.S.C. 2409a, Donnelly simply "sat on his hands" to the prejudice of Eklutna. By 1961 at the very latest, Donnelly knew of the government's position that the disputed land was not available for homestead. If he had sued in a timely manner and prevailed, the United States could properly have been named as defendant, and the disputed land would have been excluded from selection and conveyance to Eklutna. Moreover, Eklutna would have been spared the obligation to defend a claim that is essentially against the United States. In light of Donnelly's failure to diligently enforce his rights, the court of appeals correctly concluded in the opinion below, as it did in *Lee,* that "equity and good conscience" cannot permit Donnelly to bring his claims contesting the validity of the patent to Eklutna in the absence of the United States.

Donnelly misconstrues § 22(b) when he argues that it provides "cumulative protection of prior homestead rights . . ." as a "non-QTA remedy since the United States claims no interest in the lands patented to Native Corporations." Petition at 12. The provision does in fact protect valid homestead claims, but no term in it purports to revive "prior homestead rights" that were barred by another statute (*e.g.*, the QTA).

In essence, Donnelly's argument is that Congress intended § 22(b) to give new life to every homestead and similar claim that ever was. If he is correct, then all

applications for homestead, trade and manufacturing sites or any other purposes, which were ever denied on all 40 million acres to be conveyed to Native Corporations under ANCSA, can be reopened and given a new two-year statute of limitations dating from the time of the decision to convey to a Native Corporation. However, Congress intended ANCSA to be a settlement of aboriginal claims, not to resurrect stale claims and extend or renew the period in which to contest old decisions.

To sum, the court of appeals correctly applied the *Lee* precedent to the facts in this case and dismissed Donnelly's §§ 14(g) and 22(b) claims against Eklutna attacking the validity of the patent from the United States. This Court denied certiorari in the *Lee* case earlier this year. The *Lee* case involved virtually identical facts and even the same lawyer for claimant. There appears to be no reason why certiorari should be granted in this case on the §§ 14(g) and 22(b) issues.

III. CONSTRUCTIVE TRUST IS NOT AN AVAILABLE REMEDY IN THIS CASE.

The court of appeals correctly dismissed Donnelly's common law claim for imposition on Eklutna of a constructive trust in regard to the disputed land. 841 F.2d at 975. The court of appeals in the first *Lee* appeals decision disposed of the constructive trust theory on the basis that the United States was an indispensable party. 809 F.2d at 1410-11. In this case the court of appeals in addition adopted the holding of the district court in *Lee*, 629 F. Supp. 721, 728-29 (D.Alaska 1985), that common law rights were pre-empted by the comprehensive scheme of ANCSA. The district court held that, in ANCSA, Congress "spoke

directly'' to claims such as Donnelly's, thereby pre-empting common law causes of action and remedies. *Id.* Eklutna cannot add to well-reasoned decision of the district court and will only summarize it here.

ANCSA's language, structure, and legislative history indicate that Congress intended it to provide a comprehensive and final resolution of all issues relating to Native land claims in Alaska. Congress viewed ANCSA as constituting a complete and detailed *''settlement package,''* in which Alaska Natives agreed to the extinguishment of all their claims based upon aboriginal title in exchange for fee title to more than 40 million acres and a cash settlement of about one billion dollars. H.Conf.Rep. No. 746, 92nd Cong. 1st Sess. 1, 34 (1971), U.S.Code Cong. & Admin. News 1971, p. 2192 (emphasis original). Allowing private parties to claim ownership to ANCSA-conveyances under a host of common-law theories would enable them to undermine the ANCSA settlement and to prevent Native Corporations from fully enjoying the fruits of the settlement for many years. 629 F.Supp. at 728.

Moreover, Congress ''spoke directly'' in ANCSA concerning individuals' rights to assert claims to ANCSA-conveyance lands based on prior use and occupancy. At least four separate, detailed ANCSA provisions address and define these rights. *See*, §§ 14(c)(1) (primary place of residence or occupancy); 14(g) (leases, contracts, rights-of-way, and easements); 22(b) (homesteads, headquarter sites, trade and manufacturing sites, and small tract sites); 22(c) (mining claims and locations). Congress believed that ''[a]ll valid existing rights to [ANCSA-conveyance lands], including inchoate rights of entrymen and mineral

locators, are protected'' under ANCSA. H.Conf.Rep. No. 746, at 37, U.S.Code Cong. & Admin.News 1971 at 2229. 629 F.Supp. at 728-729.

Since Congress ''spoke directly'' in ANCSA about individuals' rights to assert claims to ANCSA lands and established a comprehensive program for determining such rights, the district court correctly determined that Congress intended ANCSA to ''occupy the field'' in this area and to pre-empt common-law theories. Any attempt to supplement ANCSA with common-law remedies, such as the constructive trust theory, would alter the comprehensive legislative scheme adopted by Congress in ANCSA, rather than to ''fill a gap'' that Congress has not occupied. 629 F.Supp. at 729, citing *City of Milwaukee v. Illinois,* 451 U.S. 304, 313-319 (1981).

IV. PETITIONER'S § 14(c)(1) CLAIM WAS PROPERLY DISMISSED.

Eklutna's Opposition to Petition for Writ of Certiorari in the related case of *Lee v. Eklutna, Inc.,* No. 88-549, discusses in detail why ANCSA § 14(c)(1) should not be construed to benefit trespassers such as Donnelly at the expense of the intended beneficiaries of ANCSA, the Alaska Natives, and why the court of appeals correctly held that the United States is an indispensable party to such a claim when, as here, it arises from a homestead claim. That discussion is incorporated by reference into this Opposition and will not be repeated *in toto.*

A. ANCSA WAS INTENDED TO BENEFIT NATIVES, NOT TRESPASSERS

ANCSA was enacted as a comprehensive settlement of the claims of Alaska Natives based upon aboriginal

title. 43 U.S.C. 1601(a); 117 Cong. Record 4678, 46785-86, 46788 (Dec. 14, 1971). Its overall purpose is to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal claims . . ." 43 U.S.C. 1601(a). Congress further intended that ANCSA be liberally interpreted in favor of the Natives. *Cape Fox Corp. v. United States*, 4 Cl.Ct. 223, 231 n. 11 (1983). Notwithstanding the fact that it is absurd to contend that a comprehensive statute enacted to settle Native claims somehow grants rights to a trespasser like Donnelly, he argues that "legal or illegal, occupancy . . . alone is the sole condition" to a reconveyance under § 14(c)(1). Petition at 21.

Although the language of § 14(c)(1) contains only a reference to occupancy, it is "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Fed. Sav. and Loan Ass'n. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 691 (1987), quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). As in all cases of statutory construction, this Court's task is to interpret the words of the statute in light of the purposes Congress sought to serve. *Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983).

ANCSA was never designed to be remedial legislation for failed homesteaders. Since ANCSA was enacted for the purpose of remedying prior wrongs and neglect suffered by the Native peoples of Alaska, it must be construed in light of this purpose. But if Donnelly is correct in asserting that § 14(c)(1) applies in this situation, then

every rejected homestead entryman, every unsuccessful applicant for a trade and manufacturing site or headquarters site, and every person who has failed to lawfully acquire a small tract entry, will have vested rights under § 14(c)(1).

Even worse, under the Donnelly's interpretation, willful trespass and knowing violation of the public land laws would be rewarded under § 14(c)(1). Those, like Donnelly, who stay in spite of the rejection of their unlawful entries, trespass notice, and full knowledge that they have no right to entry or occupancy, would be entitled to benefits under § 14(c)(1).

Thus, Donnelly's interpretation of § 14(c)(1) is not just inconsistent with the spirit of ANCSA, it would actually defeat the basic intent of the Act.

B. THE DISPUTED LAND WAS AT ALL TIMES WITHDRAWN FROM ENTRY AND OCCUPANCY.

Donnelly contends that his occupancy was legal because it was not forbidden by § 24 of the FPA. However, the disputed land was at all material times closed to public entry and thus not open to homesteading, and Donnelly was aware of the closed status of the disputed land. *Supra* at 2-7. Donnelly attempts to argue that his trespassing was valid occupancy and cites *Watt v. Western Nuclear,* 462 U.S. 36, 48-50 (1983), for the proposition that § 24 of the FPA should not be construed to direct one land use to the exclusion of other uses. However, the Act at issue in *Watt* expressly reserved mineral rights to the United States and simultaneously provided for homesteading on the surface of the lands. "Congress' purpose in

severing the surface estate was to encourage the concurrent development of both the surface and subsurface of [the] lands." *Id.* at 50. This is hardly analogous to the *withdrawal* of public lands from public entry as provided in the FPA.

C. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS.

Donnelly maintains that court of appeals wrongfully added a condition of legal occupancy (in Donnelly's case, under the homestead laws, because that is how his claim arose) to § 14(c)(1). Petition at 18-23. He argues that in *Hakala v. Atxam Corporation,* 753 P.2d 1144 (Alaska 1988), the Supreme Court of Alaska has adopted a reading of § 14(c)(1) that did not impose such a condition. Donnelly implies that the decision in *Hakala* is in conflict with the court of appeals' decision in this case.

Donnelly's characterization of the *Hakala* case is erroneous, because the Alaska Supreme Court found that legal occupancy was a condition to a § 14(c)(1) claim. In *Hakala,* the Alaska Supreme Court held that a hunting guide was entitled to a § 14(c)(1) reconveyance for a cabin used as a primary place of business. The Alaska Supreme Court saw "the primary issue" as being "how the court should interpret the phrase 'a primary place of business' as contained in § 14(c)(1) of ANCSA." 753 P.2d at 1147. The court perceived the phrase "a primary place of business" as effectuating Congress' intent to protect a "wide array of existing legitimate businesses," those who were using the lands in "an *established, legal* and *routine* fashion." (Emphasis added.) *Id.* The court in *Hakala* was

apparently not confronted with a trespasser or a claimant who was otherwise on the land illegally. Even so, the Alaska court clearly required that a claimant under § 14(c)(1) must be legally on the land, a status which Donnelly did not have.

In a very recent decision, the Ninth Circuit has noted that *Hakala* is consistent with an interpretation of § 14(c)(1) that denies a right of reconveyance to illegal occupants but grants a right to legal occupants. *Buettner v. Kavilco, Inc.*, — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988). Both *Hakala* and *Buettner* are discussed in detail in Eklutna's Opposition to Petition for Certiorari in *Lee v. Eklutna, Inc.*, No. 88-549.

D. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO DONNELLY'S § 14(c)(1) CLAIM TO A HOMESTEAD.

Eklutna relies on its discussion of this point in its Opposition to Writ of Certiorari in *Lee v. Eklutna, Inc.*, no. 88-549. That discussion includes an analysis of Fed. R. Civ. P. 19(a) and 19(b) which parallels the discussion in this brief at pp. 13-16.

V. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT.

Although of great importance to Eklutna, this case will have no practical impact outside the State of Alaska. Even within the state, its impact will be limited to failed homesteaders and illegal occupants of lands conveyed to Native Corporations. Eklutna does not know how many such persons there are, but there are almost certainly not

the "thousands" Petitioner alleges (Petition at 25) without the slightest shred of evidence in the record.

This case involves nothing more than the argument of a failed homesteader that ANCSA, which was enacted for the benefit of Alaska's Natives, provides him with amnesty from his failure to comply with the provisions of federal law concerning homesteads and, thereby, entitles him to 92.5 acres in addition to the 67.5 he has already received. The district court's and the court of appeal's decisions barring his stale claims, refusing to grant a trespasser rights under ANCSA at the expense of Alaska's Natives, and disallowing an attempt to litigate against a Native Village Corporation claims that rightfully should have been timely brought against the United States, are—just and fair.

—o—

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

43 U.S.C. 1603. Declaration of Settlement

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

43 U.S.C. 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

43 U.S.C. 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

* * * *

Eklutna, Cook Inlet

43 U.S.C. 1611. Native Land Selection

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided,* that no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further,* That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by section 1610(a) of this title within the region, if possible.

Federal Rule of Civil Procedure 19.

Joinder of Persons Needed for Just Adjudication.

(*a*) *Persons To Be Joined If Feasible.* A person who is subject to service to process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of action in the person's absence may (i) practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person

should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(*b*) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.